RSA 101/2001
BEFORE
THE HON'BLE MR. JUSTICE B.P. KATAKEY

JUDGMENT & ORDER (Oral)

This appeal by the plaintiffs is directed against the judgment and decree dated 24th May, 2001 passed by the learned Civil Judge (Senior Division), Morigaon in Title Appeal No.21/1999 allowing the appeal preferred by the defendants by setting aside the judgment and decree dated 13th October, 1999 (decree drawn on 14th October, 1999) passed by the learned Civil Judge (Junior Division) No.1, Morigaon (now Munsiff), in Title Suit No.5/1994, whereby and whereunder the plaintiffs' suit was decreed.

[2] The appellants as plaintiffs instituted Title Suit No.5/1994 in the Court of the learned Civil Judge (Junior Division) No.1, Morigaon against the present respondent Nos.1, 3, 4 and the predecessor-in-interest of the present respondent Nos.2(1) to 2(6), namely Baneswar Bordoloi @ Kaneswar, for declaration of right, title and interest in respect of the land measuring 7 Bighas 0 Katha 5 Lechas comprising in 2(two) dags, i.e. 1 Bigha 0 Katha 3 Lechas in Dag No.330 and 6 Bighas 0 Katha 2 Lechas in Dag No.331, covered by Period Patta No.72(new)/36(old) relating to the survey for the period 1967-68/1971-72 of Kahuaati Kissam, Silpukhuri Mouza in the district of Morigaon, described in the schedule to the plaint, contending inter alia that after the death of the original owner, Ghetuka Koch, the said land devolved on the plaintiff Nos.1 and 2, being the daughter and son, and accordingly they became the owners by right of inheritance. It has also been pleaded that the defendant No.1 on 15th January, 1990 got the Chitha mutation in respect of the said land, which, however, on being objected to was subsequently cancelled. The plaintiffs further pleaded in the plaint that on 20th December, 1990 there was an initial attempt made for dispossession by the defendants and ultimately they were dispossessed by the defendants from the suit land. The plaintiffs, therefore, filed the suit for declaration of right, title and interest in respect of the schedule land and also for recovery of khas possession.

[3] The defendants contested the said suit by filing joint written statement contending that the defendant No.1 on 23rd September, 1959 (Exhibit-Kha/Ga) and 29th February, 1960 (Exhibit-Gha) purchased 2 Bighas and 1 Bigha 1 Katha of land, respectively, from the predecessor-in-interest of the plaintiffs, Ghetuka Koch, by registered deeds of sale and accordingly, the defendant No.1 became the owner in respect of the said land measuring 3 Bighas 1 Katha, which is part of the suit land. It has also been contended that the defendant No.2 became the owner in respect of 2 Bighas 2 Kathas 10 Lechas of land because of the mortgage by conditional sale executed by Ghetuka Koch, the predecessor-in-interest of the plaintiffs on 25th February, 1953 (Exhibit-Ka). The further contention of the defendants is that the defendant No.4 acquired right, title and interest in respect of 1 Bigha 1 Katha 15 Lechas of land, out of the suit land, because of the verbal transfer of the said land by Ghetuka Koch in favour of the defendant No.4's father in the year 1960. The defendants, therefore, pleaded that since the predecessor-in-interest of the plaintiffs transferred the right, title and interest in respect of the entire suit land measuring 7 Bighas 0 Katha 5 Lechas, the plaintiffs have no right, title and interest over the suit land. The defendants have also pleaded that their right over the suit land has been perfected by adverse possession as they are possessing the same for more than 35/40 years.

[4] The Trial Court on the basis of the pleadings of the parties framed the following issues for determination:-

(1) Whether there is any cause of action for the suit?

(2) Whether the suit is maintainable in its present form?

(3) Whether the suit is barred by limitation?

(4) Whether the suit is barred by law of adverse possession?

(5) Whether the plaintiffs have any right, title and interest over S/L.

(6) Whether the Defendants acquired any right, title and interest over S/L.

(7) Whether the plaintiffs are entitled to get a decree as prayed for?

(8) To what other relief/reliefs the parties are entitled?

[5] While the plaintiffs examined 4(four) witnesses including the plaintiff No.1 as PW-1, the defendants also examined 4(four) witnesses including the defendant No.1 as DW-4. The plaintiffs proved the orders of mutation both marked as Exhibits-1 and 2, apart from the revenue paying receipts marked as Exhibits-3(1) to 3(5). The defendants proved 8(eight) documents, which are marked as Exhibits-Ka to Unga and Cha-1 to Cha-3. The Trial Court on the basis of the evidences adduced by the parties decreed the suit of the plaintiffs by holding that since at the time when Exhibits-Ka, Kha/Ga and Gha were executed as well as the verbal sale in the year 1960 was affected, the land was covered by annual patta, which was subsequently converted to period patta in the name of Ghetuka Koch, no right, title and interest would be passed on to the purchaser, as during continuance of the annual patta, Ghetuka Koch would have the right to transfer the use of the land only till it is converted to periodic patta and not thereafter. The claim for acquiring right over the suit land by adverse possession has also been rejected.

[6] Being aggrieved, the defendants preferred Title Appeal No.21/1999 in the Court of the learned Civil Judge (Senior Division), Morigaon, which has been allowed by the aforesaid judgment and decree dated by setting aside the judgment and decree passed by the Trial Court. The ground on which the appeal was allowed by the First Appellate Court is that the documents, i.e. Exhibits-Ka, Kha/Ga and Gha being more than 30(thirty) years old presumption as to due execution of the said document has to be drawn, without, however, considering as to whether the defendant No.2 could acquire right, title and interest by virtue of Exhibit-Ka deed dated 25th February, 1953, the same being the mortgage deed in respect of 2 Bighas 2 Kathas 10 Lechas, so also by the defendant No.4 by the verbal sale in respect of 1 Bigha 1 Katha 15 Lechas of land. Nothing has been discussed relating to the claim for adverse possession. Hence, the present appeal.

[7] The appeal was admitted for hearing on the following substantial questions of law:-

(1) Whether the sale deeds on which the title was claimed by the defendants namely, Exts ’Ka’, ’Kha’, ’Ga’ and ’Gha’ were duly proved in accordance with the provisions of the Indian Evidence Act?

(2) Whether the sale deeds Exts ’Ka’, ’Kha’, ’Ga’ and ’Gha’ were capable of conferring title on the defendants as held by the learned lower appellate Court?

[8] I have heard Mr. Kabra, learned counsel for the appellants. The respondents have not entered appearance despite service of notice.

[9] It has been submitted by Mr. Kabra, learned counsel for the appellants that it is evident from the pleadings of the defendants in the written statement that the defendant No.4 having claimed the title over a plot of land measuring 1 Bigha 1 Katha 15 Lechas by right of an oral transfer by Ghetuka Koch in favour of his father in the year 1960 for a consideration of Rs.400/-, he canno

t acquire right, title and interest in respect of the said land, in view of the provisions contained in Section 54 of the Transfer of Property Act, 1882 (in sho rt, 1882 Act ) read with Section 17(1)(b) of the Registration Act, 1908, which requires that the transfer of immovable property, value of which is more than hu ndred rupees, can be made only by written and registered document. The learned counsel further submits that the Trial Court has not gone into the said aspect o f the matter at all and dismissed the suit of the plaintiffs solely on the groun d that Exhibit-Ga (original of which is marked as Exhibit-Kha) sale deed dated 2 3rd September, 1959 and Exhibit-Gha sale deed dated 29th February, 1960 being mo re than 30(thirty) years old presumption about the due execution has been drawn under Section 90 of the Indian Evidence Act. Referring to the Exhibit-Ka, regist ered document dated 25th February, 1953, it has also been submitted that it is e vident therefrom that the same is a mortgaged deed in respect of the land measur ing 2 Bighas 2 Kathas 10 Lechas executed by Ghetuka Koch in favour of the father of the defendant No.2 for taking a loan of Rs.300/- and by virtue of such mortg age, neither the defendant No.2 nor his father can claim right, title and intere st, as the mortgagor has a right to redeem the mortgage after payment of the pri ncipal money and there being no order passed by any Court, at the instance of th e mortgagee, to foreclose the mortgage debarring the mortgagor’s right to redeem the property or passing a decree that the property has been sold in favour of t he mortgagee as required under Section 67 of the Transfer of Property Act. The learned counsel submits that the said aspect of the matter has also not been gon e into by the First Appellate Court while allowing an appeal and setting aside t he decree passed by the Trial Court. The learned counsel, therefore, submits th at the plaintiffs are at least entitled to declaration of their right, title and interest and recovery of khas possession in respect of 4 Bighas 4 Kathas 5 Lech as of land out of the total land measuring 7 Bighas 0 Katha 5 Lechas. Mr. Kabra further submits that the defendant No.4 having claimed the right over the suit land by adverse possession, the burden lies on him to prove that he was in unint errupted possession of the property for more than 12(twelve) years openly and de nouncing the title of the rightful owner, which the defendant No.4 has failed to prove as he did not even come to the witness box to adduce evidence.

[10] I have considered the submissions of the learned counsel for the appellants and also perused the records including the judgments and decrees pas sed by the learned Courts below.

[11] As noticed above, the Trial Court has decreed the suit of the pl aintiffs, as there is no dispute that they are successor-in-interest of Ghetuka Koch, and by holding that by Exhibits-Ka, Kha/Ga and Gha no title can be passed on to the defendants as those were executed when the suit land was the annual pa tta land and they will have no right after the annual patta land which was subse quently converted to periodic patta in the name of the vendor, namely Ghetuka Ko ch, the predecessor-in-interest of the plaintiffs. The claim of the defendants for adverse possession has also been negated by the Trial Court. The Trial Cour t, however, has not been gone into the question as to whether by Exhibit-Ka mort gage deed any right in respect of 2 Bighas 2 Kathas 10 Lechas of land can passed on to the father of the defendant No.2 or, thereafter, to the defendant No.2. Similarly the question as to whether the defendant No.4 would acquire any right, title and interest in respect of 1 Bigha 1 Katha 15 Lechas of land by the verba l sale has also not been gone into. As noticed above, the First Appellate Cour t has allowed the appeal preferred by the defendants by setting aside the judgme nt and decree passed by the Trial Court basically on the ground that Exhibits-Kh a/Ga and Gha sale deeds, apart from Exhibit-Ka mortgage deed dated 25th February , 1953, being more than 30(thirty) years old and those being produced from the p roper custody, presumption as required under Section 90 of the Evidence Act rela ting to the due execution of those documents could be drawn and though such pres umption is rebuttable, the plaintiffs could not rebut the presumption by adducin g any cogent evidence. The question as to whether by Exhibit-Ka mortgage deed dated 25th February, 1953, the defendant No.2 can claim any right, title and int

erest in respect of 2 Bighas 2 Kathas 10 Lechas of land as well as by verbal sale the defendant No.4 can acquire right, title and interest in respect of 1 Bigha 1 Katha 15 Lechas of land has, however, not been gone into at all.

[12] The defendants have not disputed that the predecessor-in-interest of the plaintiffs, Ghetuka Koch, was the original owner of the suit land. They have, however, claimed that they have acquired the right, title and interest over the suit land by virtue of Exhibit-Ka mortgage deed, Exhibit-Kha/Ga sale deed, Exhibit-Gha sale deed and the verbal sale in the year 1960. They have also set up an alternative plea of adverse possession contending that they are in possession of the suit land for last more than 35-40 years.

[13] Exhibit-Ka dated 25th February, 1953 is a deed of mortgage by conditional sale executed by Ghetuka Koch, the predecessor-in-interest of the plaintiffs while securing loan of Rs.300/-. Section 60 of the Transfer of Property Act provides that at any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property, which are in possession or power of the mortgagee and where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and at the cost of the mortgagor either to retransfer the mortgaged property to him or to the third party as may be directed, or to execute and to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished, provided the right conferred by this Section has not been extinguished by act of the parties or by decree of a Court. Section 67 of the Transfer of Property Act gives a right to the mortgagee to foreclose the mortgage or to sale. It provides that in the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become due to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited, a right to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold, however, to the exceptions provided in Clauses-(a) to (d).

[14] In the instant case, as noticed above, by Exhibit-Ka deed dated 25th February, 1953 land measuring 2 Bighas 2 kathas 10 Lechas of land was mortgaged for securing the loan of Rs.300/- by Ghetuka Koch, the predecessor-in-interest of the plaintiffs in favour of the predecessor-in-interest of the defendant No.2, with the stipulation that the mortgagee shall enjoy the land measuring 2 Bighas 2 Kathas 10 Lechas for a period of 2(two) years and after expiry of the said period the mortgagor would take over possession of the land after paying the loan amount of Rs.300/-. It has also been stipulated that failure to do so the land would stands transferred to the mortgagee. The possession of the said land was also handed over to the mortgagee. That being the position, the defendant No.2’s possession cannot said to be adverse to the interest of the original owner, namely the plaintiffs, as he has held the land as the mortgagee.

[15] The Exhibit-Ka though is a mortgage by conditional sale, the title in the land mortgaged would not automatically transferred to the mortgagee because of failure to pay the loan amount and redeem the mortgage unless of course the mortgagee files a suit as required under Section 67 of the Transfer of Property Act for passing a decree debarring the mortgagor from his right to redeem the property or for a decree that the property be sold. Till such time title over the mortgaged land continues to be with the mortgagor and on his death with his successor-in-interest. The plaintiffs also cannot by means of the present suit recover the possession in respect of the said property, suit being not for redemption of the mortgage.

[16] The defendants in the written statement also contended that the

land measuring 1 Bigha 1 Katha 15 Lechas was sold by Ghetuka Koch in favour of the father of the defendant No.4 in the year 1960, which was an oral transfer, at Rs.400/-. Section 54 of the Transfer of Property Act provides how a sale is to be made. It stipulates that sale in case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument. Section 17(1)(b) of the Registration Act provides that non testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property is compulsorily registerable. Section 49 of the Registration Act provides that no document required by Section 17 or by any of the provisions of the Transfer of Property Act, to be registered, shall affect any immovable property comprised therein, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power unless it has been registered. It has, however, been provided that a document affecting immovable property and required by the Registration Act or the Transfer of Property Act to be registered may be received as evidence of a contract in a suit for specific performance under the Specific Relief Act, 1877 or as evidence of any collateral transaction not required to be effected by registered instrument.

[17] The case of the defendants in the written statement being that there was verbal transfer of the land measuring 1 Bigha 1 Katha 15 Lechas by Ghetuka Koch in favour of the defendant No.4's father at a consideration of Rs.400/-, the said transfer is not admissible in evidence to prove title and the same cannot confer right, title and interest either on the defendant No.4 or his father, there being no registered instrument. The respondent No.4, therefore, would not acquire any right, title and interest in respect of 1 Bigha 1 Katha 15 Lechas of land by virtue of the said oral transfer. The defendant No.4 also did not come forward to adduce evidence. In the absence of any evidence from the defendant No.4, though the burden heavily lies on him to prove the adverse possession, such plea of the defendant No.4 cannot be sustained.

[18] The defendant No.1, however, could prove the sale deeds dated 23rd September, 1959 (Exhibit-Kha- the original/Exhibit-Ga, the certified copy thereof) and 29th February, 1960 (Exhibit-Gha), by which Ghetuka Koch transferred 2 Bighas and 1 Bigha 1 Katha of land, respectively, totaling 3 Bigha 1 Katha, in favour of the defendant No.1. Those documents are more than 30(thirty) years old and were produced from the proper custody, i.e. the custody of the defendant No.1 in whose favour the sale deeds were executed and as such, the Courts below have rightly drawn the presumption about the handwriting of Ghetuka Koch and also its due execution. The plaintiffs also have neither challenged those deeds nor prayed for their cancellation. That being the position, the defendant No.1 would acquire right, title and interest in respect of the aforesaid 3 Bighas 1 Katha of land by virtue of the aforesaid sale dated 23rd September, 1959 and 29th February, 1960, respectively.

[19] As noticed above, the defendants have no dispute that the predecessor-in-interest of the plaintiffs, namely Ghetuka Koch, was the owner. That being the position, while the plaintiffs will have the title in respect of mortgaged land being 2 Bighas 2 Kaths 10 Lechas and in respect of the land measuring 1 Bigha 1 Katha 15 Lechas, which according to the defendants, were verbally sold to the father of the defendant No.4, the plaintiffs would also be entitled to recover khas possession in respect of 1 Bigha 1 Katha 15 Lechas of land only and not in respect of the land measuring 2 Bighas 2 kathas 10 Lechas, which is covered by mortgaged deed dated 25th February, 1953 (Exhibit-Ka).

[20] In view of the aforesaid discussion, the plaintiffs' suit is partly decreed by declaring right, title and interest in respect of 2 Bighas 2 Kathas 10 Lechas of land, covered by Exhibit-Ka mortgage deed dated 25th February, 1

953 and also in respect of the land 1 Bigha 1 Katha 15 Lechas, which was stated to have been purchased by the defendant No.4’s father by oral transfer. The pla intiffs would also be entitled to recover khas possession of the land measuring 1 Bigha 1 Katha 15 Lechas, which the defendant No.4 has claimed that his father has purchased by oral transfer. The judgment and decree passed by the First App ellate Court is accordingly partly set aside.

[21] The appeal is partly allowed. No costs.

[22] Registry is directed to draw up the decree and send down the rec ords.